

STATE OF CALIFORNIA

Public Utilities Commission  
San Francisco

**M e m o r a n d u m**

**Date:** April 20, 2004

**To:** The Commission  
(Meeting of April 22, 2004)

**From:** Alan LoFaso, Director  
Office of Governmental Affairs (OGA) — Sacramento

**Subject:** **AB 2768 (Richman) Telecommunications: regulatory  
streamlining**  
As Amended April 13, 2004

**Legislative Subcommittee Recommendation:** None.

**Summary:** This bill would require the Commission to commence and complete a proceeding to eliminate outdated regulations and harmonize regulatory structure in light of changing technology and competitive conditions.

**Digest:** Existing law, P.U. Code sec. 701 et. seq., provides that the Commission may do all things that are “necessary and convenient” in the supervision and regulation of public utilities, including telephone corporations, as provided for in P.U. Code sec. 216(b) and defined in P.U. Code sec. 234.

This bill would require the Commission, by January 1, 2005, to commence a proceeding resulting in a final decision by January 1, 2006, to develop rules for harmonizing the regulation of the communications industry for specified purposes, including promoting competition, investment, and economic growth, while protecting existing policies, such as basic service at reasonable rates, universal access, and competitive carriers’ access to incumbents’ infrastructure, consistent with federal law and regulation. This bill would expressly authorize the Commission to hire consultants to assist in meeting this requirement.

This bill would require the Commission to rely on competitive forces in the communications industry in lieu of command and control regulatory mandates to promote consumer choice and advance consumer interests. This bill would further authorize the Commission to exempt the communications industry from existing mandates, rules, and orders in furtherance of its provisions, and require the Commission to report to the legislature when using this authority.

This bill would expressly provide that transmission of communications over the Internet, as specified, would not make an entity providing specified activities a public utility or subject to Commission jurisdiction.

This bill would make legislative findings and declarations as follows:

- Advancements in technologies providing voice, video, and data transmission are substantially increasing consumer choices and reinventing the marketplace with unprecedented speed;
- The convergence of these technologies has resulted in the availability of highly competitive products and services, for a variety of sources;
- California's regulatory laws and rules remain rooted in outdated models that often inappropriately apply disparate regulatory treatment to competitive products and services, depending on their underlying technology and these laws and rules do not reflect the communications marketplace, making them outdated, often inhibitory and contrary to the public's best interests;
- To continue to employ outdated and often unnecessary regulations injures the public by distorting the forces of competition in the communications marketplace, stifling capital investment, and hampering economic growth.

**Analysis:** AB 2768 would make a strong policy statement in favor of competition and flexible regulation in light of rapidly growing and changing technologies. From its standpoint, the ALJ Division states that the timeline for the mandated proceeding is problematic. It calls for what would be an extraordinarily comprehensive look at the structure and appropriate oversight of an industry, perhaps comparable to our multiple-year effort to restructure the electric industry, but provides only 12 months to do it, from start to final decision. The potential impact of such a proceeding on this state and its citizens would be enormous.

Staff provided additional comments on the bill:

**Comments from the Telecommunications Division:**

- It is not necessary to direct the Commission, via legislation, to initiate such a rulemaking proceeding. The Commission already has the ability to initiate investigations into new technologies and their impacts and it regularly exercises this authority in its normal course of operations. A majority vote of the Commission can initiate such rulemaking investigations. Moreover, the Commission already has rulemaking investigations underway to look at broadband and voice over Internet technology issues, so such legislation is not needed.
- The bill prematurely assumes that the delivery of high-speed communications over the Internet is an information service and not a communication service. This is a very complex matter that is under review at the FCC and Commission. Although decisions may ultimately be made that such high-speed services are information services, those bodies should be allowed to weigh evidence before reaching conclusions without a record.

- There are no specific speed criteria to define “high-speed” identified and the level of speed is continually becoming faster as technology advances. The language also assumes that the interest of consumers seeking high-speed access is similar to those consumers that do not have such interests.
- The bill wrongly assumes that there is an availability of highly competitive communication products throughout the state. In reality, there are current portions of the state do not have access to such technologies (let alone basic service) and that competition is limited in many other areas.
- The bill wrongly assumes that technological advancements have or will necessarily lead to increased competition in the broadband markets. The data, however, indicates that the California broadband market lacks robust competition and whereas several new broadband technologies are commercially available, for the most part the California broadband market is served still only by DSL and cable modem. Unlike other parts of the country, DSL holds the predominate share of the California broadband market. As of December 2002, DSL had a 49% market share and cable modem had a 39% market share and incumbent telecommunications providers command the vast majority of the DSL market. Incumbents witnessed a nearly 230% growth in DSL lines between December 2000 and March 2003, whereas the DSL lines of their competitors only increased less than 50%. Over the same period competitors’ share of the DSL market dropped from 16% to 8% but incumbents’ share grew from 84% to 92%, with the DSL market share of the two largest incumbent providers growing 83% to 91%.
- The bill wrongly assumes that the Commission uses “command and control regulatory mandates” for such services. In reality, the Commission has set forth flexible DSL broadband rates for carriers and lightly regulates this area for service abuses. Although the Commission has exerted its jurisdiction over the high-speed delivery of communications over the Internet, the Commission is only looking at this issue presently and has not mandated any regulations on this technology to date.
- The bill unrealistically proposes a shortened review of complex and well thought out regulatory policies developed in recent years. The review would be intended to provide a fair and balanced outcome for parties with conflicting interests, while considering due process requirements. If such a rulemaking were desired, an 18-month period would be a more suitable timeframe to allow due process consideration of view points from divergent groups of intervening parties.
- While the bill indicates that the Commission may employ consultants, the Commission would need a significant budget augmentation for this huge and complex undertaking.

**Legal Impact (from Legal Division):**

This bill seemingly removes the Commission's authority and/or discretion to impose traditional cost-of-service regulation in the telecommunications industry and requires the Commission to rely solely on "free market" forces to provide consumers with service choices and consumer protection in the telecommunications market in general. It removes the Commission's discretion to decide how best to regulate or not to regulate, with the effect of nullifying several ongoing Commission proceedings, including the

Telecommunications Consumer "Bill of Rights" proceeding. The bill is worded so broadly that it would also seem to prevent the Commission from instituting General Rate Cases or otherwise regulating the non-New Regulatory Framework (NRF) carriers besides via NRF or something similar.

This bill also would remove the Commission's jurisdiction to regulate intrastate transmission services (including broadband) for Internet information services as well as the terms and conditions of intrastate and interstate transmission services for Internet information services and VOIP. This legislative jurisdictional shift would nullify current policy at the Commission and conflict with current policy at the FCC classifying broadband transmission connection between the end-user and his/her internet service provider (ISP) as a regulated common carrier service. The Commission has argued in comments before the FCC that (a) this is good policy because the broadband transmission connection, whether cable modem or DSL service, is typically a "bottleneck" -- i.e. there are currently no viable alternatives, and the vast majority of customers have access only to one of these modes of broadband transmission, and (b) as such, regulation to ensure nondiscriminatory, reasonably priced access is essential. The bill also seems at odds with congressional intent to preserve a regulatory role for the states, including, for instance, section 706 of the Telecommunications Act of 1996, which expressly contemplates a partnership between the FCC and the states in developing advanced communications services.

Although the bill requires the Commission to maintain the universal service programs, the bill does not address how the Commission is to do so as customers migrate from wireline carriers paying the universal service fees if the Commission has no regulatory authority over the entities providing Internet transmission/broad band services. In addition, the bill seems to legislate Commission authority that goes beyond the Commission's current authority under the Public Utilities Code by requiring the Commission to affirmatively "promote" competition. It is the Commission's statutory duty to ensure that consumers receive utility service at fair and reasonable rates, not to "promote" anything.

## **FISCAL IMPACT**

This bill expressly authorizes the Commission to hire consultants to complete its mandate. This express authorization and the expedited timeline required in the bill would suggest that its author believes that these consultants will be necessary.

These consultant costs have not been identified yet. It is also noteworthy that many bills are enacted one year and funds for necessary staff are appropriated in following year's budget. In order to use consultants to meet the expedited timeline, it would be necessary for any funds to be appropriated contemporaneously with the bill.

## **LEGISLATIVE HISTORY**

Asm. U&C: 10-0 (do pass as amended) (4/19/04)

**SUPPORT/OPPOSITION**

Support: SBC, Cingular Wireless, Los Angeles County Economic Development Corporations, T-Mobile, Intel, Verizon Wireless, American Electronics Association, Los Angeles Area Chamber of Commerce, Cellular Telecommunications & Internet Association.

Opposition: MCI (oppose unless amended); AT&T (oppose unless amended); TURN; Pac West Telecom, inc; CALTEL.

**LEGISLATIVE STAFF CONTACT**

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**Date:** April 20, 2004

**BILL LANGUAGE:**

BILL NUMBER: AB 2768    AMENDED  
BILL TEXT

AMENDED IN ASSEMBLY    APRIL 13, 2004

INTRODUCED BY    Assembly Member Richman  
(Coauthors:    Assembly Members Calderon, Jerome Horton, and  
Ridley-Thomas)

FEBRUARY 20, 2004

An act to add Article 11 (commencing with Section 910) to Chapter 4 of Part 1 of Division 1 of the Public Utilities Code, relating to telecommunications.

**LEGISLATIVE COUNSEL'S DIGEST**

AB 2768, as amended, Richman. Telecommunications: regulatory streamlining.

Under existing law, the Public Utilities Commission has regulatory authority over public utilities, including telephone corporations, and authorizes the commission to fix just and reasonable rates and charges. Under that authority, the commission has adopted decisions adopting an incentive-based regulatory framework called the New Regulatory Framework for certain telephone corporations.

The existing Federal Telecommunications Act of 1996 preempts any state or local statute or regulation that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service, but does not prohibit a state from imposing on a competitively neutral basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. The prohibition also does not affect the authority of a state or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis.

Under existing law, the Federal Communications Commission licenses and partially regulates providers of commercial mobile radio service, including providers of cellular radiotelephone service, broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR) services. Under existing law, no state or local government may regulate the entry of or the rates charged by any commercial mobile radio service, but is generally not prohibited from regulating the other terms and conditions of commercial mobile radio service. Where commercial mobile radio services are a substitute for land line telephone exchange service for a substantial portion of the telecommunications within a state, commercial mobile radio service providers are not exempted from requirements imposed by a state commission on all providers of telecommunications services that are necessary to ensure the universal availability of telecommunications services at affordable rates.

This bill would require that the commission rely on competitive forces in the communication industry to promote consumer choice and

marketplace protection whenever possible, in lieu of command-and-control regulatory mandates. ~~The bill would prohibit the commission from establishing rules to regulate the Internet, including fiber optic broadband or other high speed delivery of communications on the Internet.~~ The bill would provide that the transmission of communications over the Internet, whether by voice, data, video streams, or any combination thereof, does not, solely by reason of engaging in any of those activities, make a corporation or person providing the necessary software, hardware, transmission service, or the transmission path, a public utility or subject those activities to the jurisdiction of the commission. The bill would require the commission, by January 1, 2005, to commence a rulemaking or quasi-legislative proceeding to develop rules for harmonizing the regulation of the communications industry to eliminate regulations and policies that are no longer necessary as a result of technological advancements and competition in the communications industry, to promote competition, to promote investment that will improve quality of products, quality of service, and greater choices for consumers, and to promote economic growth. The bill would require the commission to adopt a final decision adopting rules by ~~July 1, 2005~~ January 1, 2006 .

The California Constitution gives the Legislature plenary power, unlimited by the other provisions of the constitution, to confer authority and jurisdiction upon the commission that is cognate and germane to the regulation of public utilities.

This bill would authorize the commission to exempt the communications industry from existing statutory mandates and existing rules and orders of the commission in furtherance of the purposes of the bill. The bill would require the commission to promptly report to the relevant policy committees of the Legislature, any exercise of its authority to exempt any person or corporation from a statutory mandate.

Existing law makes any public utility and any corporation other than a public utility that violates the Public Utilities Act, or who fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission guilty of a crime.

The provisions of this bill would be a part of the act and would require an order or other action of the commission to implement those provisions. Because a violation of those provisions or a violation of an order or other action by the commission to implement those provisions would be a crime, the bill would impose a state-mandated local program by creating new crimes.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) Advancements in technologies that provide voice, video, and

data transmission, including , *but not limited to*, landline, wireless, cable, satellite, Internet, and voice-over Internet, are ~~exponentially~~ *substantially* increasing consumer communications choices and are reinventing the marketplace with unprecedented speed.

(b) The convergence of these various communications technologies , *which provide voice, data, and video transmission*, has resulted in the availability of highly competitive products and services, from a variety of sources.

(c) California's regulatory laws and rules remain rooted in outdated models that *often* inappropriately apply disparate regulatory treatment to competitive products and services, depending on their underlying technology. These regulatory laws and rules do not reflect the technological advances that have brought competition to the communications marketplace, making them ~~unnecessary~~ *outdated, often inhibitory*, and contrary to the public's best interests.

(d) To continue to employ outdated and ~~unnecessary regulatory laws~~ *often unnecessary regulations* injures the public by distorting the forces of competition in the communications marketplace, stifling capital investment, and hampering economic growth.

(e) The Public Utilities Commission should, by January 1, 2005, initiate a rulemaking or quasi-legislative proceeding to streamline and harmonize the rules and regulations pertaining to communications and should, by ~~July 1, 2005~~ *January 1, 2006* , enact final rules consistent with these findings and declarations.

SEC. 2. Article 11 (commencing with Section 910) is added to Chapter 4 of Part 1 of Division 1 of the Public Utilities Code, to read:

#### Article 11. Communications Regulatory Streamlining

910. (a) The commission shall, by January 1, 2005, commence a rulemaking or quasi-legislative proceeding to develop rules for harmonizing the regulation of the communications industry for the following purposes:

(1) Elimination of regulations and policies for the communications industry that are no longer necessary or appropriate as a result of technological advancements and competition in the communications industry.

(2) Promoting competition.

(3) Promoting investment that will improve quality of products, quality of service, and greater choices for consumers.

(4) Promoting economic growth.

(b) The rules adopted by the commission shall protect existing policies that provide for the following:

(1) Basic service at reasonable rates.

(2) Incentives and transfer payments to provide universal access to low-income, disabled, and high-cost customers.

(3) Access to, or use of, the infrastructure of incumbent local exchange carriers by competitive carriers, consistent with requirements of federal law and the Federal Communications Commission.

912. The commission shall rely on competitive forces in the communications industry to promote consumer choice and to advance the interests of consumers whenever possible, in lieu of command-and-control regulatory mandates.

~~913. The commission may not establish rules to regulate the~~



~~Internet, including fiber optic broadband or other high speed delivery of communications on the Internet.~~

913. *The transmission of communications over the Internet, whether by voice, data, video streams, or any combination thereof, does not, solely by reason of engaging in any of those activities, make a corporation or person providing the necessary software, hardware, transmission service, or the transmission path, a public utility or subject those activities to the jurisdiction of the commission.*

914. The commission shall, by ~~July 1, 2005~~ January 1, 2006 , issue a final decision adopting rules consistent with this article.

915. The commission may employ consultants to assist in complying with this article.

916. The commission may issue rules and orders exempting the communications industry, including telephone corporations, from existing statutory mandates and existing rules and orders of the commission, in furtherance of this article. The commission shall promptly report to the relevant policy committees of the Legislature, any exercise of its authority to exempt any person or corporation from statutory mandates pursuant to this section.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.